Supreme Court, U.S.
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No. 92-1589

In The
Supreme Court of the United States
October Term, 1992

EXXON SHIPPING COMPANY,
Petitioner,

v.

THEODORE M. ELLENWOOD and
ANN M. ELLENWOOD,
Respondents.

STATE OF MAINE,
Intervenor-Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF IN OPPOSITION

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Questions Presented

1. Whether the provisions of state employment discrimination laws relating to physical disabilities are preempted by federal admiralty law under the circumstances of this case.

2. Whether the provisions of state employment discrimination laws relating to physical disabilities are preempted by section 503 of the Rehabilitation Act of 1973, 29 U.S.C.§ 793, in cases involving federal contractors.

3. Whether federal admiralty law recognizes the employment contract that formed the basis for plaintiff's contract claims in the case at bar.

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STATE OF MAINE
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STATE OF MAINE'S BRIEF IN OPPOSITION TO CERTIORARI

Respondent-Intervenor State of Maine respectfully requests that this Court deny Exxon Shipping Co.'s petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the First Circuit that is reported at 984 F.2d 1270 (1st Cir. 1993) and reproduced in the Appendix to the Petition for Certiorari (App.) at 1a-38a.

STATUTES INVOLVED

The Maine Human Rights Act, 5 Me.Rev.Stat.Ann.§ 4572(1) (Supp. 1992), provides in pertinent part as follows:

> It is unlawful employment discrimination, in violation of this Act, except when based on a bona fide occupational qualification:
>
> > A. For any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of race or color, sex, physical or mental disability, religion, age, ancestry or national origin, . . .or, because of those reasons, to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment; . . .
> >
> > . . . .
> >
> > E. For an employer, employment agency, or labor organization to discriminate in any manner against individuals because they have opposed a practice that would be a violation of the Act or because they have made a

> charge, testified or assisted in any investigation, proceeding or hearing under this Act.

STATEMENT OF THE CASE

The State of Maine intervened in this action pursuant to 28 U.S.C. § 2403(b) in order to present argument on the issue of whether state employment discrimination laws are preempted by section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, or by federal admiralty law.[1] For purposes of this brief, the State will rely upon the summary of the case contained in the First Circuit's opinion. 984 F.2d at 1272 (App. 2a-3a).

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[1]Because the Maine Attorney General's office was not notified that these issues had been raised until the case was on appeal, the State intervened while the case was pending in the First Circuit. *See* 984 F.2d at 1272 n.2 (App. 3a n.2).

REASONS FOR DENYING THE WRIT

Because the State intervened in this action solely to offer argument of the issue of preemption, it will address only the first two of the questions presented by Exxon Shipping's petition for certiorari.

I. SINCE THE ISSUE OF PREEMPTION IS NOW GOVERNED BY THE AMERICANS WITH DISABILITIES ACT, THERE IS NO REASON TO GRANT CERTIORARI IN THIS CASE.

As a preliminary matter, the employment discrimination claims asserted by Theodore Ellenwood in this case arose before the effective date of the Americans with Disabilities Act of 1990 ("ADA"), Pub.L.No. 101-336, 42 U.S.C. § 12101 *et seq.*[2] The ADA is now the governing source of federal law with respect to employment

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[2]Pursuant to section 108 of Pub.L. No. 101-336, the employment discrimination provisions of the ADA took effect on July 26, 1992.

discrimination against persons with disabilities. This includes seamen like Ellenwood. Indeed, Exxon Shipping expressly acknowledges in its petition that the ADA would now govern employment discrimination suits by a seaman in Ellenwood's position. Petition at 10, 17.

Moreover, the ADA directly addresses the issue of preemption; it contains an express anti-preemption provision. 42 U.S.C.§ 12201(b). As a result, if a similar case were to be brought today, the issue of preemption would be resolved under the ADA, not under the Rehabilitation Act or under principles of admiralty law.

The existence of the ADA totally undercuts Exxon Shipping's arguments as to the importance of this case. While this case remains a matter of considerable importance to the parties, the preemption

issues raised in the petition have been rendered largely academic by the ADA. The State is not aware of any reason why this Court should explore the question of whether state employment discrimination statutes were preempted under the law as it existed prior to the ADA.

Exxon Shipping devotes considerable space in its petition to a discussion of the alleged problems that the maritime industry will face in the future if subjected to inconsistent obligations under state employment discrimination statutes. Although the State believes that Exxon Shipping's catalog of potential

inconsistencies is greatly exaggerated,[3] any problems that currently exist result from the anti-preemption provision of the ADA and cannot be cured by review of the First Circuit's decision in this case. Accordingly, the preemption issues raised by Exxon Shipping would not warrant certiorari even assuming for purposes of argument that there might be some merit to Exxon Shipping's criticisms of the First Circuit's decision.

However, as discussed below, there is in fact no merit to Exxon Shipping's contentions. The First Circuit's decision is consistent with existing principles of

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[3]In this connection, it should be noted that Exxon Shipping's alleged concern that a single vessel might simultaneously be made subject to 50 different state laws can be resolved through application of standard choice of law rules. Indeed, the First Circuit expressly open the issue of which state's employment discrimination statute would be applied upon remand. 984 F.2d at 1273 n.3 (App. 4a n.3).

admiralty law and federal preemption, and there is no conflict between the First Circuit's decision and the holding of the Eleventh Circuit in *Howard v. Uniroyal*, 719 F.2d 1552 (11th Cir. 1983).

II. THE FIRST CIRCUIT'S DECISION IS CONSISTENT WITH EXISTING ADMIRALTY LAW

The best answer to Exxon Shipping's claim that the First Circuit's decision is inconsistent with federal maritime law is contained in the First Circuit's decision itself, which contains a thorough and well-reasoned discussion of admiralty law and of the reasons why that law does not displace state employment discrimination statutes. See 984 F.2d at 1278-81 (App. 16a-20a).

Indeed, Exxon Shipping essentially agrees with the proposition that state law is only preempted if its application would frustrate some fundamental tenet of

federal admiralty law. It argues, however, that the principle of uniformity is itself a sufficiently fundamental principle of admiralty law that state employment discrimination laws should be found to be preempted. *See* Petition at 14.

This argument proves too much. If uniformity in and of itself were a sufficiently important tenet of admiralty law to displace state laws, almost all state statutes would be preempted in the maritime area. This is not the law. As this Court observed in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-74 (1959), federal courts have enforced state laws even when those laws conflict with a federal rule of maritime law. *See also id.* at 374 (state and federal governments "jointly exert regulatory powers" with respect to maritime activity). This result is

consistent with the "saving to suitors" clause in 28 U.S.C. § 1333(1), which gives federal courts original jurisdiction of any civil case of admiralty or maritime jurisdiction "saving to suitors in all cases all other remedies to which they are otherwise entitled."

Exxon Shipping cites two decisions for the proposition that state employment discrimination laws are preempted by federal maritime law. One of those cases, *Belanger v. Keydril Co.*, 596 F.Supp. 823 (E.D.La. 1984), *aff'd mem.*, 772 F.2d 902 (5th Cir. 1985), holds precisely the opposite. In that case the Louisiana age discrimination statute was found applicable, and the plaintiff's age discrimination case was tried to a jury. *See* 596 F.Supp. at 824, 827-29.

In the second case, *Indiana Civil Rights Commission v. American Commercial*

Barge Line Co., 523 N.E.2d 241 (Ind.App. 1988), *cert denied*, 492 U.S. 920 (1989), the Indiana Court of Appeals for the First District based its understanding of the preemptive effect of federal maritime law on language contained in this Court's 1920 decision in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 158, 160 (1920). *See* 523 N.E.2d at 244, 245. What the Indiana Court either did not know or ignored, however, was that in 1973 this Court stated that its decisions in *Knickerbocker Ice* and *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) -- another case relied upon by Exxon Shipping -- "have been limited by subsequent holdings of this Court." *Askew v. American Waterways Operators Inc.*, 411 U.S. 325, 338 (1973) (reversing a lower court decision that had held a Florida statute to be preempted on the basis of *Jensen* and

Knickerbocker Ice).

As *Askew* demonstrates, the modern rule is that state law is only displaced in those "isolated instances" where federal uniformity is required, not for its own sake, but to preserve an independent and fundamental principle of federal admiralty law. *Askew*, 411 U.S. at 338; *Romero*, 358 U.S. at 373-74. No such principle has been identified in this case.[4]

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[4]Exxon Shipping suggests in passing, based upon the *Indiana Civil Rights Commission* case, that the federal doctrine of seaworthiness may be implicated in cases involving physical disabilities. As the First Circuit recognized, this does not lead to the conclusion that state employment discrimination laws are preempted in their entirety but would only justify preemption if state law specifically conflicted with the doctrine of seaworthiness in a given case. 984 F.2d at 1280 (App. 19a-20a). This is unlikely to happen. Maine law, for instance, recognizes a defense based on a bona fide occupational qualification, 5 Me.Rev.Stat.Ann. §4572(1), and any legitimate physical requirements for seamen under the federal seaworthiness doctrine would constitute bona fide occupational qualifications under Maine law.

III. THERE IS NO CONFLICT BETWEEN THE FIRST CIRCUIT'S DECISION AND THE DECISION OF THE ELEVENTH CIRCUIT IN *HOWARD v. UNIROYAL, INC.*

Exxon Shipping's remaining preemption argument is based on section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793. On this issue, Exxon Shipping urges that its petition for certiorari be granted because it contends that there is a conflict between the First Circuit's decision and the opinion of the Eleventh Circuit in *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983).

Once again, the best answer to this argument is contained in the First Circuit's decision itself, which carefully considered and distinguished *Howard*. 984 F.2d at 1275-76 (App. 10a-11a). As the First Circuit noted, *Howard* did not involve the issue of whether section 503 preempts state employment discrimination

laws but was limited to the question of whether state contract remedies could be used to enforce section 503 itself. *Howard* thus does not support the proposition that Congress, by requiring that affirmative action provisions be inserted in federal contracts, thereby intended to immunize all federal contractors from state employment discrimination law.

In rejecting that proposition, the First Circuit was plainly correct. There is nothing in either the language or the legislative history of section 503 that evinces any congressional intent to preempt state law. *See* 984 F.2d at 1274-75, 1276-77 (App.7a-9a). Indeed, Congress has consistently opted against any preemption of state employment discrimination laws. *See* 984 F.2d at 1276 (App. 11a). Especially given the well-settled principle that the presumption is

against preemption, *e.g.*, *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2618 (1992), there is absolutely no merit to Exxon Shipping's argument that in enacting section 503, Congress intended to immunize any employer who does $2500 worth of business with the federal government from the application of state employment discrimination statutes.

In *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), this Court stated that "[t]he principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." In this case the nature of the regulated

subject matter -- employment discrimination -- is an area in which the absence of preemption is the rule. Moreover, there is no evidence of any Congressional intent in the Rehabilitation Act, unmistakable or otherwise, to exclude state remedies.

CONCLUSION

The petition for a writ of certiorari should be denied.

May 28, 1993 Respectfully submitted,

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